

## Attorneys: Admission Upon Diploma to the Wisconsin Bar

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## COMMENTARY

### ADMISSION UPON DIPLOMA TO THE WISCONSIN BAR

*Membership in the bar is  
a privilege burdened with  
conditions.<sup>1</sup>*

Since the bar was first organized the nature and extent of the "conditions" referred to by Justice Cardozo have been the subject of ongoing debate and controversy. The "conditions" currently imposed by the various jurisdictions for admission to the bar are either a written examination or upon motion to the jurisdiction's highest appellate court. Admission upon motion entails satisfying the jurisdiction's requirements for reciprocity or diploma privilege should either method be recognized. In Wisconsin, all of the above "conditions" for admission to the practice of law are recognized and the authority to evaluate whether an applicant has met the requisites for admission is solely vested in the appellate court.<sup>2</sup>

The purpose of regulating bar admission is to ensure that courts have the assistance of advocates of ability, learning and sound character as well as to protect the public from incompetent and dishonest practitioners.<sup>3</sup> While the purpose of bar admission regulation cannot be questioned, the means of assuring that bar members are of high character and ability frequently occasions lively discussion and periodic re-evaluation of admission practices and procedures.<sup>4</sup>

The dialogue concerning admission procedures has, in many areas, turned into controversy and this is attributable, in no small part, to the increasing number and greater mobility of law gradu-

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1. In re Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917). The Wisconsin Supreme Court has concurred in *Lathrop v. Donohue*, 10 Wis. 2d 230, 237, 102 N.W.2d 404, 408 (1960) stating: "The practice of law is not a right but a privilege subject to regulation."

2. See *State ex rel. State Bar v. Keller*, 16 Wis. 2d 377, 114 N.W.2d 796 (1961) and Wis. STAT. § 256.28 (1971).

3. Cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

4. See, e.g., Bingaman, *Illinois' Bar Examination: Time for a 75 Year Overhaul*, 60 ILL. BAR. J. 129 (1971); *Report of the Special Committee on Bar Examination*, 51 MICH. BAR J. 724 (Nov., 1972); Steininger, *The Diploma Privilege-Recent Developments*, 47 WIS. BAR BULL. 14 (April, 1974); Bussey, *Bar Examinations: A Black Perspective*, NATIONAL BAR EXAMINER 12 (Fall, 1973); Kestin, *The Bar Examination: A Trial By Ordeal*, NATIONAL BAR EXAMINER 37 (Fall, 1972); Comment, *Report of the Pennsylvania Bar Admissions Procedures*, 44 TEMPLE L.Q. 146 (1971); 3 *American Bar Association Legal Education Newsletter* (Oct., 1971).

ates.<sup>5</sup> The pressure of increased applicants has intensified the scrutiny and re-evaluation of state admission procedures and has led to a "soul searching" among members of the bar concerning just how admissions should be conducted. Evincing the contemporary climate for change in bar admission procedures have been recent proposals for universal diploma privilege, denunciations of bar examinations, the institution of the multi-state bar examination,<sup>6</sup> and challenges to the use of limited diploma privilege. The most recent challenge contesting the use of diploma privilege was *Huffman v. Montana Supreme Court*<sup>7</sup> brought in Montana's federal district court.

*Huffman* and its precursor, *Goetz v. Harrison*,<sup>8</sup> were constitutional challenges to Montana's admission practice under its "diploma privilege" statute.<sup>9</sup> Both cases challenged this statute which permitted graduates of the state law school admission to the bar without taking the annual bar examination. The petitioners in both cases were residents of Montana who had graduated from out-of-state law schools and were denied admission to the Montana bar by the Montana Supreme Court when they sought to be admitted upon motion. The ensuing suits sought to have the "diploma privilege" provision of the Montana Code declared unconstitutional as violative of the Fourteenth Amendment's equal protection clause. The Montana Supreme Court in *Goetz* held that the admission of graduates of the state law school to the bar without requiring them to take a test is reasonable and did not constitute a denial of equal protection to those who attended out-of-state law schools.<sup>10</sup>

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5. See York and Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. LEGAL ED. 1 (1973); See also 42 BAR EXAMINER 128 (No. 1, 1973); 38 BAR EXAMINER 108 (No. 3, 1969). Between 1960 and 1972 the law school enrollment has more than doubled.

6. See, e.g., Bell, *Do Bar Examinations Serve a Useful Purpose*, 57 A.B.A.J. 1215 (Dec., 1971); Gleisner & Bailey, *Why is the Bar Examination Necessary?*, THE STUDENT LAWYER 6 (Dec., 1973); Griswold, *In Praise of Bar Examinations!*, 47 FLA. BAR J. 644 (Nov., 1973); Covington, *The Multistate Bar Examination Program*, 42 BAR EXAMINER 5, 95, 154 (1972); Covington, *The Multistate Bar Examination*, NATIONAL BAR EXAMINER 9 (Fall, 1972); Covington, *The Multistate Bar Examination*, NATIONAL BAR EXAMINER 18 (Fall, 1973); Pock, *The Case Against the Objective Multistate Bar Examination*, 25 J. LEGAL ED. 66 (1966); Comment, *Admission to the Pennsylvania Bar: The Need for Sweeping Change*, 118 U. PA. L. REV. 945 (1970).

7. 372 F. Supp. 1175 (D.C. Mont., 1974). The petitioner exercised his automatic right of appeal to the United States Supreme Court and in a summary action the Court affirmed without consideration on the merits. 43 Law Week 3247 (Oct. 29, 1974).

8. 154 Mont. 274, 462 P.2d 891 (1969).

9. REV. C. MONT. § 93-2002 (1947). In addition to Montana and Wisconsin, West Virginia and Mississippi are the only other jurisdictions that allow admission upon diploma.

10. The court noted, *inter alia*, that the standards of both pre-legal and legal study are

*Huffman*, a case of first impression in the federal courts, presented a similar issue regarding the criteria a state may adopt for admission to the bar. James L. Huffman, a Montana resident and graduate of the University of Chicago Law School, after being denied admission on motion to the Montana bar, brought this action in the United States District Court for Montana challenging the constitutionality of Montana's diploma privilege statute. A three judge panel was convened and considered Huffman's request to restrain the defendant Montana Supreme Court from implementing that portion of section 93-2002, Revised Codes of Montana, which excepts Montana graduates from taking the bar examination. Further relief was sought in the form of a mandatory injunction ordering the Montana Supreme Court to admit the petitioner to the bar upon motion. In sum, the district court was urged to declare Montana's statutorily enacted "diploma privilege" violative of the equal protection clause of the Fourteenth Amendment. The court, in a two-one decision, found no arbitrary classification created by the statute working to deny the petitioner equal protection under the law.

The court held that the classification inherent in the Montana statute, which necessarily distinguishes between those attending the state law school and those who don't, could not be considered a "suspect" classification. The court also failed to find interference with the petitioner's "fundamental rights" as freedom of speech, right to vote and of interstate travel. The issue the court felt compelled to determine was whether there existed any rational justification for the existence of the diploma privilege in Montana.<sup>11</sup> The court reasoned that the object of the classification under scrutiny created by 93-2002, R.C.M., is to ensure that the courts and people of Montana are represented by attorneys of sound ethical character and competent legal skills. After delineating the curriculum at the University of Montana Law School and noting the Montana

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higher for graduates of the Montana Law School than required of the applicants for the bar examination and that the small size of the school and its proximity to the Montana Supreme Court allow the justices to personally gauge the school's graduates. 154 Mont. at —, 462 P.2d at 895.

11. The court relied upon *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 wherein the high court stated:

A state can require high standards of qualifications, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Supreme Court's supervision of the school, the court went on to say that "this classification is reasonably related to the object of ensuring a competent and ethical bar."<sup>12</sup>

In his dissenting opinion Judge East seized upon the asserted inhibition of the petitioner's "fundamental right" to interstate travel as his basis for calling the diploma privilege unconstitutional. Judge East reasoned as follows:

. . . [S]o here the requirement of the Bar examination is a state imposed burden upon the plaintiff's exercise of his right to fully travel to Montana and receive equal treatment with other residents in like standing under the laws of that state.

I cannot escape the fact that the plaintiff, who holds the same academic qualifications required by Rule XXV [Montana Supreme Court] as do graduates of the Montana Law School is penalized and burdened under the statutory scheme in the exercise of his constitutional right to freely travel and apply for a license to practice law on equal footing.

The full thrust of the rationale and holding of *Dunn* . . . authorizes the flat statement that the statutory requirement of a Bar examination forces a resident graduate of an out of Montana American Bar Association approved law school who wishes to travel to Montana *to choose* between the exercise of his basic right to travel and his basic right to receive equal treatment in lawful pursuits under the laws of Montana with other resident graduates of an in Montana American Bar Association approved law school. Absent a compelling state interest, a state may not burden the right to travel in this way. Manifestly, Montana has failed to show herein a 'compelling state interest' in justification of the burden placed upon the plaintiff.<sup>13</sup>

The majority bluntly responded to Judge East's dissent by finding that the diploma privilege in no way impinged upon the petitioner's established residence in Montana, or his right to leave or return to the state. Thus they found discussion of interstate travel misplaced in the case at bar. In concluding the majority stated:

To summarize, it could not be seriously argued that a state might without being guilty of invidious discrimination determine the areas of law in which a bar applicant should be proficient and also the degree of proficiency which should be attained. Apart from the fact that the University of Montana Law School's requirements more nearly match the areas of law deemed impor-

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12. 372 F. Supp. at 1179.

13. *Id.* at 1186.

tant in Montana by the court (as indicated by Rule IV B6 of the Rules of the Supreme Court) than do the requirements of the University of Chicago Law School, the more important fact remains that from its relationships with the law school and from its experience with the graduates of that school, who comprise the greater part of the Montana Bar, the Court can empirically determine whether the breadth of the legal education of the Montana Law School measures up to the Court's expectations and whether the graduates do in fact have the requisite proficiency. The fact that as to one set of graduates the Court from its personal experience has a basis of confidence in the breadth and quality of its legal education, which from personal experience it cannot have as to another set, is ample reason for discriminating between the two.<sup>14</sup>

Perhaps the *Huffman* decision is but a revived beginning rather than a definitive end to the seemingly endless controversy surrounding diploma privilege. Certainly *Huffman* along with *Goetz* can be viewed as typifying the contemporary questioning and challenging of bar admission procedures generally.<sup>15</sup> The *Huffman* decision, itself, is less than monolithic. Both the court's opinion and dissent muddy the waters of the diploma privilege controversy that previously could best be described as murky and vague. Because such an amorphous decision was rendered it is unfortunate that the United States Supreme Court affirmed the federal court in a per curiam order without rendering an opinion.<sup>15.1</sup>

The emotions raised on both sides of the diploma privilege controversy are not unlike those surrounding any conflict involving questions of policy which directly affect individuals. The intensity, however, has been heightened in recent years and led down stormy new paths.<sup>16</sup> The dearth of writing on the background of diploma privilege, coupled with increased controversy about its merits, makes comment in a clarifying manner on Wisconsin's unique use of diploma privilege appropriate. In addition, there is little doubt that bar examinations have become institutionalized and, in fact,

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14. *Id.* at 1183.

15. See, e.g., Comment, *Bar Examination: Good Moral Character and Political Inquiry*, 1970 WIS. L. REV. 471; Law Students Civil Rights Research Council v. Wodman, 401 U.S. 154 (1970).

15.1. Note 7, *supra*.

16. Indeed, it seems that disparaging the use of diploma privilege has become somewhat of a *cause celebre* among some supporters of bar examinations. See Griswold, *In Praise of Bar Examinations!*, 60 A.B.A.J. 81 (Jan., 1974); 62 ILL. BAR J. 442 (April, 1974); 47 FLA. BAR J. 644 (Nov., 1973).

are administered in every state and the District of Columbia.<sup>17</sup> It makes little sense, therefore, to advocate their elimination as have proponents of universal diploma privilege. Rather, it is hoped that a reasoned essay on Wisconsin's successful application of limited diploma privilege will render it better appreciated and understood to those who would myopically challenge its continued existence.

### EARLY DEVELOPMENTS

The recognized excellence of Wisconsin law is no accident and reflects not only upon a forthright supreme court but upon the state bar as well. The keystone, of course, to a solidly structured bar is the quality of the state's admission procedures. Wisconsin limits the practice of law, in all courts of record, to those who have first obtained a license.<sup>18</sup> A person seeking to practice as an attorney is duly licensed by taking an oath pursuant to section 256.29, Wisconsin Statutes, before the supreme court. A person can qualify to take the oath in one of three manners as follows:<sup>19</sup>

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17. Stevens, *BAR EXAMINATION COVERAGE, LAW SCHOOL CURRICULA AND THE APPLICANT*, A.A.L.S. BAR EXAMINATION STUDY PROJECT MEMORANDUM No. 9, 12-14 (1970).

18. WIS. STAT. § 256.30 (1971).

19. Section 256.28, WIS. STAT., states:

No person shall be admitted or licensed to practice law in this state, including appearing before any court, except in the following manner:

(1) *ADMISSION ON LAW DIPLOMA, LIST OF LAW SCHOOLS.* (a) Every person 21 years of age or over and of good moral character who is a citizen of the United States, a resident of this state and a graduate of a law school in this state which law school at the time of his graduation was approved by the American bar association, as shown by the record of the clerk of the supreme court, and who has met the requirements of sub. (1)(b) shall be admitted to practice law in this state by the supreme court and, when such court is not in session, by one of the justices thereof, by an order signed by such justice and filed with the clerk of said court.

(b) To be admitted on the diploma privilege, every applicant must present to the clerk of the supreme court his diploma and a certificate of the law school at which he completed his formal law studies, showing the courses completed and the semester credits earned and stating that according to the official academic records of such school the applicant has satisfactorily completed at least the minimum of legal studies required for the first degree in law and the total semester hours were not less than 84; and such studies included not less than 60 semester hours of accredited study, satisfactorily completed in regular courses having as their primary and direct subject matters the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state in the areas generally known as: administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, labor law,

legislation, ethics and legal responsibility of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. There shall be included in such minimum not less than 30 semester hours covering the following subject matters: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, wills and estates. These requirements may be satisfied by combinations of the curricular courses, and the dean of each law school in Wisconsin shall file with the clerk of supreme court upon its request a certified statement setting forth the courses taught in his law school which are accredited for a first degree in law and the percentage of the time devoted in each course to the subject matter of the areas of law required by this rule for eligibility to admission on the diploma privilege. In addition to these requirements a law school may require other courses or practical training, for which credit toward a degree may or may not be given, as a prerequisite to its certification of eligibility for admission on the diploma privilege.

(c) The clerk of the supreme court shall compile a record of all law schools which are approved by the American bar association, with the date of such approval and those which are not approved; and such record so compiled shall constitute an official record of the supreme court, and proof of the fact that the law schools therein stated as approved by the American bar association were so approved at the times therein stated.

(2) **ADMISSION ON CERTIFICATE OF BAR COMMISSIONERS.** Every person 21 years of age or over and of good moral character who is a citizen of the United States and a resident of this state and a graduate of any law school which at the time of his graduation was approved by the American bar association shown by the record of the clerk of the supreme court shall upon the production of the certificate of the board of state bar commissioners, be admitted to practice law in this state by the supreme court, and when such court is not in session, by one of the justices, by an order signed by such justice and filed with the clerk of said court. A certificate shall be given by the board of state bar commissioners to every person who successfully passes an examination given by the board of state bar commissioners covering all or part of the subject matter in the areas of law listed in sub. (1)(b).

(3) **ADMISSION ON PROOF OF PRACTICE ELSEWHERE.** Every person 21 years of age or over and of good moral character who is a citizen of the United States and a resident of of this state and who shall have been admitted to practice law in any other state or states or territory, or the District of Columbia, may be admitted to practice law in this state by the supreme court upon motion, or, when the court is not in session, by one of the justices thereof, after filing with the clerk of the supreme court (1) his written application therefor, (2) a certificate of his admission to practice law by a court of last resort in such other state or territory or the District of Columbia and (3) satisfactory proof that he is a citizen of the United States and a resident of this state, is of good moral character, and has been engaged in actual practice in such other state or states or territory or the District of Columbia or in the courts of the United States for 5 years within the last 8 years prior to filing his application, exclusive in each case of time spent in the armed forces. The certificate of the judge of any court of record in such other state or territory or the District of Columbia or court of the United States, before whom such applicant has practiced, under the seal of such court, may be deemed sufficient proof of such practice in such state or territory or the District of Columbia or court of the United States.

(4) **SERVICE COUNTED AS PRACTICE OF LAW.** Service as judge of a court of record of any state or territory or the District of Columbia or of the United States, service in any department of the United States government including service in the armed forces determined by the supreme court to be actual legal service, and teaching in any law school which is approved by the American bar association, may be



(1) Upon the strength of a diploma through graduation from a law school within Wisconsin, which at the time of graduation, was approved by the American Bar Association, as shown by the record of the clerk of the supreme court and which graduate has followed the procedural and curricular guidelines set out in section 256.28(1)(b), Wisconsin Statutes;

(2) If a graduate of any law school which was American Bar Association approved at graduation, upon the presentation of a certificate issued by the board of state bar commissioners which certificate is issued upon successfully passing the bar examination administered by the commissioner pursuant to section 256.28(2), Wisconsin Statutes;

(3) By having been admitted to practice in the court of last resort of any other state, United States territory or in the District of Columbia and having actually practiced in that jurisdiction during five of the preceding eight years. In addition all three methods, examination, diploma and reciprocity require that the applicant to the bar be a United States citizen and Wisconsin resident, be of good moral character, and have attained majority.<sup>20</sup>

It is not generally appreciated that Wisconsin bar admission procedures date back to the state's territorial era. From Wisconsin's inclusion in the territorial organization known as the Northwest Ordinance in 1787 to the Civil War, admission to the bar has been characterized as being "marked by legislative see-sawing between control and decontrol."<sup>21</sup> Since the Civil War and especially 1885 there has been an increased development of and resulting

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deemed to be actual practice of law for the purpose of sub. (3) and such law teaching or such legal service performed in this state as well as in such other state or states or territory or District of Columbia will be counted under the 5 and 8 years' test provided in sub. (3).

20. Section 4 of Rule 2 of the State Bar Rules as adopted by the supreme court at 53 Wis. 2d xi (1972) further states:

Only active members may practice law. No individual other than an enrolled active member of the State Bar shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law. A judge in this state may allow a nonresident counsel to appear in his court and participate in a particular action or proceeding in association with an active member of the State Bar of Wisconsin who appears and participates in such action or proceeding. Permission to such nonresident lawyer can be withdrawn by the judge granting it if such a lawyer by his conduct manifests incompetency to represent a client in a Wisconsin court or his unwillingness to abide by the Code of Professional Responsibility and the Rules of Decorum of the court.

21. Rice, *Admission to the Practice of Law in the Courts of Wisconsin*, 4 WIS. L. REV. 65, 66 (1927).

vigilance through statutes and supreme court rules regulating admission to the bar.<sup>22</sup>

The government of the Northwest Territory, through exercise of its legislative powers, first regulated the practice of law in "the territory of the United States Northwest of the River Ohio" by a statute dated August 1, 1792. This statute, which made political loyalty and passing an examination administered by a territorial judge prerequisite to practicing law, was soon replaced with a stricter statute in 1798.<sup>23</sup> For approximately the next three and one-half decades there is no evidence of the enforcement or even existence of laws regulating admission to the bar. It was not until Wisconsin became an independent territory, in 1836, that the state's most exacting statute prior to the institution of a formal bar examination was enacted; however, it too was short lived.<sup>24</sup>

Soon after statehood in 1848 the legislature opened the bar to all citizens regardless of training or ability by declaring that every court should admit to practice before it any state resident of good moral character.<sup>25</sup> More realistic legislation, which for the most part codified existing practice, was passed in 1861 and has since been modified into the present day section 256.28, Wisconsin Statutes.<sup>26</sup> Provisions of the original statute limited the practice of law to those applicants who could demonstrate their knowledge and ability in an open court examination conducted by a circuit judge or his appointed examiners.<sup>27</sup>

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22. *Id.*

23. *Id.* at 67. The statute passed in 1798 required, *inter alia*, at least four years of legal study in a practitioner's office within the territory. The requirement lasted only two years until 1800 when Wisconsin became part of the then created Indiana territory. *Id.*

24. *Id.* at 68. This statute, which lasted two years, contained requirements of citizenship, residence, good moral character, professional study and provisions for disbarment.

25. R.S. 1849, ch. 87 § 26. While this provision endured until 1859 when repealed it is apparent in the following excerpt from Motion of Goodell, 39 Wis. 232, 240 (1875) that the courts never implemented it:

We do not understand that the circuit courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified, by nature, education, or habit, for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the legislature long since led to its repeal.

26. Wis. Laws 1861, ch. 89.

27. Until the institution of the board of law examiners in 1885 at least some of the in-court examinations as to technical ability were of rather dubious quality. The following is an excerpt from the 1923 WISCONSIN BLUE BOOK at 416:

The examinations given were sometimes very much of a farce and were occasionally passed by as being a mere formality. It is said that the only question asked an

By virtue of chapter 79 of the Laws of 1870 graduates of the newly opened law department of the University of Wisconsin were admitted to the bar upon presentation of a certification of graduation.<sup>28</sup> With the initiation of formal legal education came the institution of the "diploma privilege". This was probably a distinct improvement in an era where admission to the bar may well have been obtained by advising the examiner where to eat.<sup>29</sup> By 1881 at least two years of study in the law department at Madison were required for graduation and eligibility under the diploma privilege statute.<sup>30</sup> Indeed, admission to the bar via study at Madison must have been considered formidable when compared to the informal administration of in-court examinations as an alternative entree to the bar.

Until 1885 what semblance there was of a "law examination" varied as the number of judges who administered them. No uniform standard by which to measure an applicant's learning or ability existed and naturally the ideas of the circuit judges as to what was "sufficient learning in the law" varied greatly. Eighteen-eighty-five saw the institution of a formalized written bar examination and the establishment of a "board of examiners for the examination of applicants for admission to the bar."<sup>31</sup> This also was an obvious improvement in admission procedure for it presented a standardized examination for all aspirants to the bar. Equally important, eligibility for taking the examination was conditioned upon the completion of two years of legal study. There was, how-

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applicant upon one occasion was "Where can you get the best oyster stew?" Upon leading the judge and a few friends to the place and paying the bill, he was admitted without further formality. The natural result of such a procedure was that persons were sometimes admitted to the practice of law who were incompetent and untrustworthy.

28. The law department began in 1868 and graduated its first class in 1869. Marquette University Law School, whose predecessor institution was established in 1894, was not accorded the diploma privilege until 1933 and in fact opposed it. See note 45, *infra*.

According to one author the purpose of the legislation creating the diploma privilege was to "attract students to Madison who were flocking to Michigan." Fox, *Diploma Privilege in Wisconsin*, 11 MARQ. L. REV. 71 (1926). Another plausible reason may have been the advantage of any formal training over the minimal amount required to pass the in-court examination.

29. See note 27, *supra* and Shaw, *Should a Law Diploma Admit to the Bar?*, 1 AM. LAW SCHOOL REV. 196 (1902).

30. See note 21, *supra* at 73. In 1894 the course was extended to three years where it remains today.

31. Wis. Laws 1885, ch. 63. The examination was required of all who were not admitted as graduates of Madison or under reciprocity.

ever, no delineation as to the quality or content of this study which presumably could have been done in a law office.

Thus the upgrading of admission procedures and requirements in Wisconsin was led by the establishment of a law department at Madison and the implementation of diploma privilege for its graduates. The bar examination could be viewed as a stop-gap measure to assure at least some parity between the Madison trained graduates and those of less comparable training. The impetus, then, for a uniform bar examination was not to test the law school graduates but those with less desirable training. It may well be that the bar examination was considered the less rigorous route to membership in the legal profession. The preference for obtaining formal legal training was further stressed by chapter 174 of the Laws of 1897 wherein the legislature adopted an expanded diploma privilege. This chapter authorized the admission of graduates of any "law school of any other state or territory which shall be accredited as a school of equal standing as the college of law of the University of Wisconsin by the board of examination for admission to the bar of this state." This provision existed until 1903 when it was repealed ostensibly as a result of the board of examiners' reluctance to determine the standing of foreign law schools.<sup>32</sup> Since 1903 the diploma privilege has continued to admit graduates of Madison and since 1933 graduates of Marquette University Law School.<sup>33</sup>

According to William G. Rice, Jr.:

The year 1903 was marked by a considerable raising of law training standards by the legislature, by the supreme court, and by the university [of Wisconsin]. Not only did the Statute of 1903 . . . restore the earlier attitude towards school and institutions not under state control, but it raised the period of prerequisite law study to three years. Moreover, it obligated the supreme court to make from time to time such regulations as it might deem desirable as to the course of study, standard of requirements, and examination, of applicants.<sup>34</sup>

The emphasis on formal legal education occasioned changes in

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32. Wis. Laws 1903, ch. 19 §§ 1-3. See also note 21, *supra* at 76, n. 28.

A recent bill to amend section 256.28 which would allow the admission of graduates of all law schools regardless of accreditation status was proposed to the legislature by Assembly Bill 188 introduced January 23, 1973. This bill was refused to pass pursuant to Assembly Joint Resolution 13 on October 26, 1973.

33. Wis. Laws 1933, ch. 60. See also *In re Admission of Certain Persons to the Bar of the State of Wisconsin*, 211 Wis. 337, 247 N.W. 877 (1933).

34. See note 21, *supra* at 77.

admission standards at Madison which, according to then Dean Harry S. Richards, "resulted from a movement on the part of members of the bar throughout the country to raise the standards of the legal profession by exacting higher entrance requirements, longer periods of study, and better preliminary education."<sup>35</sup> The ever exacting criteria for attainment of a law diploma from Madison consistently outpaced the other methods for entrance to the bar well into the twentieth century. A person who could not meet the requisites for graduation from Madison was relegated to sitting for the bar examination or entering the bar through reciprocity.<sup>36</sup> As late as 1926 the following statement could be made summing up the admission procedure to then:

It may be asked why the state law school should make a greater demand for its degree than the legislature and the supreme court make for admittance to practice. But this is a question which might with equal relevancy have been asked at any time in the sixty years of the law school's history, for its requirements have habitually been stricter than those of the legislature and courts. Certain requirements of the latter such as citizenship and residence, have never found place in the school. But the educational standards have almost continuously been most severe. . . . [W]hile the state continues to entrust to the school the control of one avenue of admittance to the practice, and while full-time law school study remains only one of the avenues, the school may well maintain a standard, at least for regular students, which, beyond satisfying the state's requirements for professional preparation, will fulfill the state's other requirement of educational excellence in its university.<sup>37</sup>

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35. *Id.* at 78.

36. It is interesting to note that entrance via the bar examination was not considered the most inferior method of admittance from the standpoint of preparation, but rather reciprocity was. By Wis. Laws 1911, ch. 196 the requirement of practice in another state was lengthened from three years to five out of the preceding eight years which it remains today. This change was proposed by the board of examiners who were aware of persons leaving Wisconsin to practice for three years in other states where the standards of admission were lower and then returning to practice in Wisconsin. See note 21, *supra* at 79, n. 41.

37. *Id.* at 85. This statement remains substantially unchanged. Section 256.28, Wis. STAT., requires that applicants for the bar examination have graduated from an American Bar Association approved law school. Under A.B.A. Standard 305, APPROVAL OF LAW SCHOOLS: STANDARDS AND RULES OF PROCEDURE, the academic requirement of 1200 class hours is surpassed by both Marquette and Madison. In fact, out of a list of 115 approved law schools only 25 require as many credit-hours as the two law schools. See note 17, *supra* at 19-31.

Additionally, both schools require a four year bachelors degree earned from an ac-

The emphasis in Wisconsin has clearly been to foster education at in-state institutions whose graduates become members of the bar by virtue of their training. Those entering the Wisconsin bar via the diploma privilege were and continue to be among the best prepared in the country. The bar examination's traditional purpose has been to regulate those with less comparable training.<sup>38</sup> It has only been in recent years that bar examinations have reached their ascendancy and become the *raison d'être* for admissions in many states. Indeed, the importance of the bar examination has become somewhat misplaced as the following remark by Laurence De Muth, in reference to the American Bar Association's 1921 wholesale adoption of bar examinations as the sole criteria for admissions, indicates:

I have frequently wondered why the decision was as it was, that the practicing members of the bar would administer what is now so familiarly known as the bar examination to candidates for admission, when the real purpose of our venture into this field from the standpoint of the American Bar Association was to set standards of legal education so that we could be assured that the law schools of this country were turning out men who were capable of being admitted to the bar.<sup>39</sup>

In an earlier national symposium on the respective merits of bar examinations and the diploma privilege, Dean Leon Green of the Northwestern Law School also placed a premium on legal education. When commenting on whether the existence and/or improvement of bar examinations had improved admission standards, Green said:

It is a fact that improvement has been made in bar examination

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credited college or university which is not required under A.B.A. Rule 502. Both institutions are and have been for over fifty years members of the American Association of Law Schools which exacts higher standards of its members than A.B.A. accreditation standards. See MARQUETTE UNIVERSITY LAW SCHOOL BULLETIN, 1974-1975 and UNIVERSITY OF WISCONSIN LAW SCHOOL ANNOUNCEMENTS, 1974-1975.

It should also be noted that two of the remaining three state schools in the country that still have the diploma privilege were cited as being national leaders, along with Madison, in toughening standards for earning a degree; they were West Virginia and Montana. See note 21, *supra* at 84.

38. Statutory language requiring an applicant to the bar examination to have graduated from an ABA accredited law school did not appear until 1971. See Supreme Court Order, 48 Wis. 2d vii (1971).

39. 18 BAR EXAMINER 236, 237 (1949). Part of the opening remarks delivered as moderator of a panel discussion on diploma privilege before the national conference of bar examiners.

technique and also the examiners in most states are giving remarkable devotion to their work. But I doubt that improvement in bar examinations or any refinement in examination technique is of any great professional significance. I am inclined to think that the improvement in admission standards which have counted are the higher requirements for admission to law school and the steady strengthening of law schools themselves. These have come about as the result of a slow, tedious, jockeying process initiated by a few leaders of the bar and carried through by bar association committees supported by some of the courts and quite generally supported by the universities.<sup>40</sup>

Dean H. Claude Horack of Duke University Law School had this to say as a participant in the same symposium with Dean Green:

The raising of the educational requirements in most states to comply with the standards set by the American Bar Association has undoubtedly brought a better quality of applicant to the bar examinations but that the bar examinations have done much to encourage a better type of legal education in law schools is doubtful. Most bar examiners sincerely believe that they are weeding out those unfit or those unprepared to practice law, but the success of the 'repeaters' in most states seems to show that persistence rather than legal talent is the basis upon which admission may be finally gained.<sup>41</sup>

#### RECENT DEVELOPMENTS

The use of diploma privilege in Wisconsin has not been without its detractors. In 1921 the report of a special committee on legal education and admission to the bar was presented at the annual American Bar Association convention in Cincinnati. As a result of the committee's report the delegates adopted the following resolution:

The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.<sup>42</sup>

In 1924 the Wisconsin Bar Association adopted the American Bar Association resolutions pertaining to admission to the practice

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40. *Why Bar Examinations?*, 33 ILL. L. REV. 908 (1939).

41. *Id.* at 891.

42. 46 REPORT OF AMERICAN BAR ASS'N 679, 688 (1921).

of law.<sup>43</sup> The Wisconsin Supreme Court, however, failed to entirely adopt these recommendations and the diploma privilege was kept.<sup>44</sup> The supreme court recognized that conformity with general proclamations does not generally make the best policy and by retaining the diploma privilege has voiced confidence in the state's two law schools.<sup>45</sup>

Recently, it has been suggested that the existence of the diploma privilege in Wisconsin is "due more to inertia rather than a well thought out program to secure its adoption."<sup>46</sup> Given the historical analysis this comment may be applicable to the period since the 1930s. This is not to suggest, however, that the diploma privilege has gone unquestioned during the past forty years. Since 1931 there have been more than a dozen statutory changes effected by the legislature and supreme court rulings with the most recent changes being a supreme court order dated June 8, 1973.<sup>47</sup> In addition, there have been periodic reviews by the supreme court concerning the merits of retaining the diploma privilege.<sup>48</sup>

In June of 1954 the House of Governors of the Wisconsin Bar Association at its annual meeting in Eau Claire, Wisconsin, passed the following resolution:

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43. In sum, the ABA recommended the abolition of the diploma privilege requiring bar examinations as well as graduation from a law school having:

- (1) The admission requirement of at least two years of study in a college;
- (2) The graduation requirement of;
  - (a) if a full-time school; study for three academic years, or
  - (b) if a part-time school; a longer course equivalent in the number of working hours;
- (3) An adequate library;
- (4) Teachers giving entire time to the school. The school not being operated as a commercial enterprise, nor salaries of teachers depend upon the number of students.

Wisconsin statutory requirements and the University of Wisconsin had specified the academic requirements listed since 1890. See note 30, *supra* and accompanying text.

44. See 190 Wis. v-viii (1926).

45. At least two Marquette faculty members went on record as opposing the extension of diploma privilege to the school's graduates in an article by Professors Zollman and Fox entitled *Diploma Privilege in Wisconsin*, 11 MARQ. L. REV. 73 (1926) wherein they concluded:

. . . Marquette University . . . recognizes fully the consequences on the morale of both its faculty and its student body of the extension of [diploma] privilege to it and far from desiring it will oppose with all legitimate means within its power the receipt of such a 'gift of the Greeks!' *Id.* at 78.

46. Steinger, *The Diploma Privilege — Recent Developments*, 47 WIS. BAR BULL. 14 (April, 1974).

47. See 59 Wis. 2d vii (1973).

48. A brief was filed at the supreme court's request by the Marquette Law School as recently as 1969 wherein proposed revisions of bar admission rules and procedures were extensively discussed.



BE IT RESOLVED that the standing committee on Legal Education and Bar Admission study the question of whether or not candidates for admission to the Bar should be required to take a Bar examination regardless of whether they are a graduate of a State Law School and a report thereon be made at the next meeting of the Association.

The result was a thorough study of the Wisconsin admission procedures under the chairmanship of Professor James D. Ghiardi.<sup>49</sup> The approach this committee took was to determine whether or not the diploma privilege as it exists in Wisconsin is detrimental to the training and education of lawyers at the Marquette and Wisconsin law schools.<sup>50</sup>

The committee held in favor of retention of the diploma privilege as it existed in Wisconsin.<sup>51</sup> It concluded that even though ". . . there is room for improvement in the present method of educating and training lawyers in Wisconsin, the elimination of the diploma privilege would in no way improve education but would, in all probability, hinder such education under present circumstances."<sup>52</sup>

A compendium of the committee's findings follows:

In support of continuation of the diploma privilege Mr. W. Wade Boardman, then president of the Board of Bar Commissioners, stated:

(1) That a good law school faculty is in a better position to test and evaluate an applicant's qualifications for the practice of law than is an examining board.

(2) That a change in the present diploma privilege might very readily result in a lowering of standards of the present bar examination and that it would greatly increase the cost of administration, which cost would in all probability be borne by the legal profession in the form of an annual license fee.

(3) It would lower the present teaching standards of both law schools by requiring an undue emphasis on bar examination preparation.

(4) That no evidence exists that the standard of legal educa-

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49. See 28 WIS. BAR BULL. 33 (April, 1955) and *Report of Legal Education & Bar Admissions Committee of the Wisconsin Bar Association—On the Diploma Privilege as it Exists in Wisconsin*, which is on file in the office of the Dean, Marquette University Law School.

50. *Id.*

51. *Id.* at 43.

52. *Id.* at 44.

tion in Wisconsin has been lowered because of the diploma privilege, but rather the evidence points to the fact that Wisconsin stands high nationally, both in legal education and in professional competency.

(5) That there has been no increase in law school attendance because of the diploma privilege.

Mr. Barney B. Barstow, then a member of the Board of Bar Commissioners, pointed out:

(1) That the bar examination should not be used as a method of limiting the number of admissions to the bar, but that it should be used only to increase professional competency and no evidence indicates that this can be done better by the bar examination than by the faculties of the two law schools.

(2) That one of the problems facing the legal profession is the lack of good moral character on the part of a small number of lawyers. That this problem can be better met by the law schools than by the board of bar examiners and would not be solved by requiring a bar examination.

Dean Oliver S. Rundell of the Wisconsin Law School was of the opinion that to require Wisconsin students to take the bar examination "would be a backwards step in what has hitherto been an encouraging forward movement."<sup>53</sup> He further reiterated his previously articulated defense of the diploma privilege wherein he said:

I think that the record produced by a student in a properly conducted law school program is more effective for the purpose of determining his professional capacity than a properly conducted bar examination could be. Students in a school are set tasks to perform and problems to solve under prescribed conditions. They are graded in competition with their fellow students who have been assigned or like tasks or problems under the same conditions. Their grades reflect their relative success in performing their assignment.

A bar examination is framed without any specific relationship to the particular educational background of the individuals who take it. It must be comprehensive in character and must call largely for information respecting things everyone is supposed to know. It necessarily emphasizes memory at the expense of reasoning and this is true no matter how conscious an effort is made to avoid such an emphasis.<sup>54</sup>

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53. Letter sent to Prof. James D. Ghiardi on October 13, 1954 which is on file in the office of the Dean, Marquette University Law School.

54. 18 BAR EXAMINER 244 (1949).

The faculties of the Marquette and Wisconsin law schools presented the following points in a joint statement favoring the continuation of the diploma privilege in Wisconsin:

(1) That the bar examiners, because of time limitations, can cover only a limited number of courses and a limited number of fields and therefore test rote learning ability rather than legal competency.

(2) That the diploma privilege does not unduly increase the number of lawyers in Wisconsin nor has it unduly increased the number of law students in the two law schools.

(3) A bar examination would necessarily require curriculum revision in the law schools and would tend to eliminate some of the elective courses offered in the schools and thereby impair the present high standard of legal education in Wisconsin and emphasize only those required for the bar.<sup>55</sup>

(4) The state of Wisconsin has only two fully approved and accredited day law schools. If the bar examination was required, marginal law schools would in all probability be organized. Marginal in the sense that they would meet the minimal statutory requirements and be aimed entirely at preparation for the bar examination.

(5) The law schools have endeavored to constantly raise their standards as to admission, graduation and educational proficiency by their joint efforts and in cooperation with the bench and bar. Should a bar examination be made the final arbiter for admission to the bar there would be a temptation on the part of the law schools to admit more students on the theory that the examination would weed out the unqualified.<sup>56</sup>

Only three arguments against the diploma privilege were considered worth discussing by the committee. The most serious resembles the issue raised in *Huffman* and charges that the diploma privilege discriminates against graduates of high grade law schools from other states.<sup>57</sup> This argument, when placed upon the constitu-

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55. See also note 17, *supra* at 37.

56. These views were resubstantiated by Dean Seitz of Marquette in 1963 at the request of then Chief Justice Brown in a letter addressed to him which is on file in the office of the Dean, Marquette University Law School.

57. The other arguments were that the ABA recommends that every graduate of a law school take a bar examination and, that a bar examination requires a comprehensive review of the law and requires a correlation of the courses studied in law school. All of the proffered arguments were more than adequately countered in the committee's report. See note 49, *supra* at 43-44.

tional ground of denial of equal protection, is formidable but, nevertheless, has little merit. At first glance this argument seems inherent in the diploma privilege concept and so obvious that it was naturally made in *Huffman*.<sup>58</sup> It is made, however, with little or no appreciation of how diploma privilege works, at least in Wisconsin, as an admission vehicle.

#### ADMISSION UPON DIPLOMA

Perhaps the place to start is in the area of semantics rather than substance. What seems compelling about a Fourteenth Amendment argument based on denial of equal protection evaporates when a term other than "diploma privilege" is used. Substituting "diploma requirement" for "diploma privilege" illustrates that a proper understanding of this admission method is hindered by the connotation created by the word "privilege". The problem is more one of conceptualization rather than an intrinsic inadequacy with this admission device. "Diploma requirement" is a better term to use in gaining a proper appreciation of the essence of section 256.28(1), Wisconsin Statutes.<sup>59</sup>

Erroneously, the diploma requirement is sometimes considered a waiver of the bar examination for preferred candidates, the graduates of in-state law schools.<sup>60</sup> A few moments of reflection will reveal it to be no such waiver at all, but merely a substitution of one form of examination for another with different people doing the examining. The extension of the diploma requirement to a law school involves a deliberate two-step process by the admitting authority, viz:

- (1) A determination by some investigatory means that the admitting authority is satisfied with the resources, administration, faculty, and program of the law school; and
- (2) A delegation, in consequence thereof, of the examining function to the faculty of the school instead of the bar examiners.

The diploma requirement, insofar as the first step is concerned, is a process of accreditation in addition to the normal accreditation

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The dialogue concerning the "pros & cons" of diploma privilege is seemingly endless; for other litanies listing arguments for and against diploma privilege see note 54, *supra* at 238-239; note 46, *supra* at 16; note 17, *supra* at 56-57.

58. See also 51 MICH. BAR J. 724, 726 (Nov., 1972).

59. The statutory language should be changed to reflect this by dropping the over-worked term "diploma privilege."

60. Again, much of this may be attributed to the use of the word "privilege."

by the American Bar Association (ABA) and the membership requirements of the Association of American Law Schools (AALS). But it is not accreditation alone, for it necessarily involves delegation of the examining function to the faculty of the law school to the same extent as such delegation is accorded to the bar examiners. An understanding of the accreditation-delegation process, then, is basic to an appreciation to the diploma requirement.

Admitting authority in Wisconsin is the exclusive province of the Wisconsin Supreme Court.<sup>61</sup> The supreme court has seen fit to accredit the state's two law schools in such a fashion that their students fulfilling the requisites for a diploma are admitted to the bar upon graduation.<sup>62</sup> Implicit in this accreditation is an aspect of control over the curriculum as well as standards the school must maintain. It must be noted, however, that the statutory requirement of ABA approval does not mean a law school is accredited *per se* for diploma requirement purposes.<sup>63</sup> The Wisconsin Supreme Court looks for more, especially emphasis on Wisconsin case and statutory law in the curriculum.

Underlying the equal protection argument there exists the assumption that all J.D. holders receive an equal legal education if they graduate from an ABA accredited law school. This makes the constitutional argument against the diploma requirement seem more persuasive. Nothing, however, could be further from the truth. Graduation from an accredited law school is not a common denominator upon which to construct an equal protection argument because neither the ABA nor the AALS in their accreditation procedures dictate curriculum or the subject areas of examination. The admitting authority accrediting for the diploma requirement in Wisconsin does consider these factors, and granting the diploma requirement means satisfaction with the curriculum and examina-

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61. See *State v. Cannon*, 206 Wis. 374, 240 N.W. 441 (1932) and *State ex rel. State Bar v. Keller*, 16 Wis. 2d 377, 386, 114 N.W.2d 796, 801 (1961) wherein the court stated: The admission of a person to practice law is constitutionally an exclusive power of the court and the attempt to exercise it by the legislature itself (or its agency) is unconstitutional and void.

62. WIS. STAT. § 256.28(1) (1971).

63. There appears to be no reason, nevertheless, why an out-of-state law school could not petition the Wisconsin Supreme Court to amend its rule to include that school's graduates under the diploma requirement extended through its accreditation-delegation process.

It is equally clear, however, that denial of such an application could be justly based on jurisdictional boundaries. This would appear to be a constitutionally sufficient basis for classification since the burden of continued policing of out of state schools to see if they maintain the standards required by the court is a valid reason to classify geographically.

tion policies of the law school to which it is extended. The assertion, then, that graduates of ABA and AALS accredited law schools are equally competent to practice in any particular jurisdiction is nonsensical. The ABA's stamp of approval is not for the purpose of certifying graduates of a particular school, without more, to the Wisconsin bar,<sup>64</sup> while the Wisconsin Supreme Court's stamp of approval is precisely for that express purpose.<sup>65</sup> Until out-of-state schools seeking accreditation by Wisconsin submit to the court's scrutiny their curricula and examination devices, Wisconsin is incapable of undertaking an even-handed extension of the diploma requirement beyond its borders. The state cannot rely upon ABA accreditation or AALS membership to insure an educational experience or an examination system equal to the standard set at Wisconsin's law schools. All that can be done is to treat applicants for the Wisconsin bar from out-of-state schools equally by subjecting them to the Wisconsin bar examination.

In an interesting symmetry, just as those who claim denial of equal protection under diploma privilege statutes premise their attacks by assuming that graduation from an accredited law school should entitle a person to bar admission anywhere, so do the supporters of universal diploma privilege adopt this same theory. This notion destroys the concept of state control over the bar admission process and proceeds upon the assumption that all J.D. programs are alike and equally qualify graduates for admission in any jurisdiction. Given the present posture of the national accreditation process, the advocates of a universal diploma privilege stand for admission to the bar without any control of the admitting authorities over the subject matter of legal education or the examination process as a preparation for the practice of law. The only requisite would appear to be the ABA's stamp of approval.<sup>66</sup>

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64. As Homer D. Crotty stated in his study on accreditation:

The primary purpose [of accreditation] is to bring about and also maintain high educational standards for professional training and service.

*The Accreditation of Law Schools*, 18 BAR EXAMINER 174 (1950). See also Cardozo, *Accreditation of Law Schools in the United States*, 18 J. LEGAL ED. 420 (1966).

65. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir., 1966); *Colorado Polytech. Col. v. State Board*, 173 Colo. 39, 476 P.2d 38 (1970); *In the Matter of Admission of Attorneys*, 29 N.Y.2d 653, 247 N.E.2d 440 (1970) *Application of Schatz*, 80 Wash. 2d 604, 497 P.2d 153 (1972); *In re Admission of Certain Persons to the Bar*, 211 Wis. 337, 247 N.W. 877 (1933).

66. The concept of state control over its admission procedures did not fair well in *Rossiter v. Board of Law Examiners*, Civil No. C-4767 (D. Colo., filed June 12, 1973 - on file in the office of the Dean, Marquette University Law School). Colorado requires that

Not only is the diploma requirement viewed as an accreditation device, but as a delegation of the examining function to an approved law school's faculty. Just as the examining function is delegated to the bar examiners by the Wisconsin Supreme Court, so it is delegated to the respective faculties of Wisconsin's two law schools. It is important to keep in mind that the state delegates examining and recommendation power, *not* power to admit. The Wisconsin Supreme Court has the power to delegate the qualifying function of bar applicants to whatever public authority it sees fit to entrust this function.<sup>67</sup> The Wisconsin Supreme Court has seen

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applicants for its bar examination graduate from ABA approved law schools. Rossiter had attended Western State University Law School which was not ABA approved and thus his application to take the Colorado bar examination was not accepted. The district court did not question the supreme court's ability to delegate accreditation power to the ABA but stated the issue as "whether or not the delegated power is used subject to procedural safeguards which would guarantee the plaintiff due process of law." The court was of the opinion that the Colorado procedure violated procedural due process. The court concluded:

The accreditation system here thus works so that one may be deprived of the opportunity to practice law without ever having had an initial determination as to whether he meets the conditions upon which the opportunity is premised. This delegation of power without providing the applicant with an opportunity to demonstrate, at some point, that he has graduated from a school which satisfies the ABA standards is, we think, a denial of his right to due process of law.

This decision raises a host of problems not the least of which is the unreasonable and potentially incredible administrative burden that would overwhelm state examining boards. This fear was voiced by the Washington Supreme Court in *Application of Schatz*, *see* note 65, *supra*, wherein the court stated:

Rules for admission to the bar, are, of course, general in their specifications. They apply to classes of applicants and are drawn to meet normal conditions. They cannot very well be tailored to meet the special merits of individuals or individual law schools. To require the Board of Governors to look into the individual qualifications and standards of every nonaccredited law school whenever a graduate from that school applies to take the bar examination would be to impose upon the board an unreasonable burden.

The district court reasoned that the petitioner should not suffer because the school he attended has never sought ABA approval. Since Colorado provides no procedure whereby a graduate of such a law school can be heard on the question of whether his school complies with the ABA standards the Colorado procedure is unconstitutional. The problem with this approach is that it is tantamount to placing the burden on the state to seek out and qualify applicants. There is no rule of constitutional or other law which would compel a state to act in such an affirmative manner.

This decision can best be described as an anomaly and has been vacated by the United States Court of Appeals (Civil No. 73-1649, 73-1650, 10th Cir., filed January 10, 1974 - on file in the office of the Dean, Marquette University Law School) and remanded for trial before a three-judge panel.

67. *See, e.g., Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir., 1967); *Application of Peterson*, \_\_\_ Alak. \_\_\_, 499 P.2d 304 (1972); *Application of Feingold*, \_\_\_ Me. \_\_\_, 296 A.2d 492 (1972). Not all bar examiner's recommendations are followed. *See Application of Courney*, 162 Conn. 518, 294 A.2d 569 (1972).

fit to delegate the examining function to the bar examiners and the law school faculties. In both respects Wisconsin is in full compliance with the ABA's standard 102 which states:

The American Bar Association believes that every candidate for admission to the bar should have graduated from a law school approved by the American Bar Association, that graduation from a law school should not alone confer the right of admission to the bar, and that every candidate for admission should be *examined by public authority* to determine his fitness for admission.<sup>68</sup> (Emphasis added)

Nothing in the standard indicates that the "public authority" must be bar examiners or cannot be a law school faculty. Indeed, when recommending a candidate to the bar, what "public authority" is in a better position to attest to that person's legal proficiency and good moral character than a law school faculty? The faith and trust on the part of the supreme court implicit in the delegation process is the same whether it is placed in a bar commission or a law school faculty.

Viewed in this manner the way to be thus admitted to practice in Wisconsin is to be examined by a Wisconsin Supreme Court delegate of the examining power.<sup>69</sup> This means writing the Wisconsin bar examination or attending one of the Wisconsin law schools and writing its examinations. The accreditation-delegation process implicit in the extension of the diploma requirement to a law school is well within the ambit of the inherent powers of the supreme court, as the sole admitting authority, to qualify applicants to membership in the bar. Claiming that this procedure results in a denial of equal protection challenges not so much the diploma requirement as it does a jurisdiction's right to qualify members of the bar for admission.<sup>70</sup>

### CONCLUSION

To conclude that all states should have a limited diploma requirement makes little sense just as concluding that no state should. The reasons for its success in Wisconsin are largely due to

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68. ABA HANDBOOK: APPROVAL OF LAW SCHOOL; STANDARDS AND RULES OF PROCEDURE, 1 (1973). This standard, however, is somewhat at odds with standard 301 (a) which states:

The law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar.

69. In addition, of course, to reciprocity.

70. Cf. Schwab, note 3 *supra*.



its unique historical development and, perhaps, the relatively small size of the state bar. Wisconsin is fortunate in that for decades two strong law departments of the state's leading public and private universities have consistently more than lived up to the responsibility accorded them under the diploma requirement. The faculties of the state's two law schools are well aware of the diploma requirement's tradition and their duty to the bench, bar and citizens of Wisconsin under it. While in some states the abolition of bar examinations would be a backward step, throwing out diploma requirement in Wisconsin would be equally regressive.

As long as, in the considered opinion of the Wisconsin Supreme Court, the diploma requirement serves the courts, bar and public it should be kept. This does not mean that its existence should never be questioned and perhaps a full scale evaluation would be warranted as has been suggested.<sup>71</sup>

Commitment to the diploma requirement need not be an emotional one and should it prove a disservice it should be abandoned. It appears, however, that for the past century it has served its purpose well.

RICHARD A. STACK, JR.

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71. See note 46, *supra* at 17-18.